

ARKANSAS SUPREME COURT

No. CR 06-918

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered

December 7, 2006

JIMMY RAY PELFREY
Appellant

v.

STATE OF ARKANSAS
Appellee

PRO SE MOTIONS FOR RULE ON
CLERK TO FILE A BELATED BRIEF
AND FOR DUPLICATION OF
APPELLANT'S BRIEF AT PUBLIC
EXPENSE [CIRCUIT COURT OF
CRAWFORD COUNTY, CR 2004-300,
HON. GARY RAY COTTRELL,
JUDGE]

APPEAL DISMISSED; MOTIONS
MOOT.

PER CURIAM

Jimmy Ray Pelfrey entered a plea of guilty to possession of drug paraphernalia with intent to manufacture a controlled substance, methamphetamine. The trial court imposed a sentence of 180 months' imprisonment in the Arkansas Department of Correction and suspended imposition of 108 months' of the sentence.

Subsequently, appellant timely filed in the trial court a *pro se* petition for postconviction relief pursuant to Ark. Code Ann. §16-90-111 (Repl. 2006), seeking reduction of his sentence. Additionally, appellant timely filed a *pro se* petition pursuant to Ark. R. Crim. P. 37.1 claiming ineffective assistance of counsel. After a hearing, the trial court denied appellant's "Petition for Postconviction Relief." This order did not identify the petition for postconviction relief by name, although both petitions concerned appellant's argument regarding parole eligibility and the seventy-

percent rule but the petitions sought different remedies.¹ Appellant has lodged an appeal from the trial court's order.

Now before us is appellant's *pro se* motion for rule on clerk, which we treat as a motion for belated brief. Appellant's brief was due on September 26, 2006. On September 22, 2006, appellant tendered one copy of his *pro se* brief and a *pro se* motion to duplicate the brief at public expense to this court. The brief was returned for correction pursuant to Arkansas Supreme Court Rule 4-7(b)(1), effective June 1, 2006, and the motion was returned for verification of appellant's signature. The clerk gave appellant a seven-day extension, until October 3, 2006, in order to make the necessary corrections and file the corrected brief and verified motion with this court. On October 4, 2006, appellant tendered a single copy of the corrected brief and the verified motion. The clerk refused to file the brief and the motion as being untimely.

Initially, we find that appellant timely filed his corrected brief with this court. Pursuant to Arkansas Supreme Court Rule 4-7(c)(4), a fourteen-day extension is given to allow a party to correct a brief not in compliance with Rule 4-7. Therefore, appellant's brief tendered on October 4, 2006, should have been accepted by the Clerk as being timely filed.

Nevertheless, the motion to file the brief belatedly and the motion for duplication of his brief at public expense are moot inasmuch as it is apparent that appellant could not prevail in this appeal if it were permitted to go forward. Accordingly, we dismiss the appeal. This court has consistently held that an appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *See Pardue v. State*, 338 Ark.

¹On the same day he filed a notice of appeal, appellant also filed a second petition for reduction of sentence under section 16-90-111. The trial court later denied the second petition under section 16-90-111. The second order is not the subject of the instant appeal.

606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*).

We first note that the tendered brief did not have an adequate abstract or addendum in that appellant failed to abstract the transcript of the guilty-plea hearing, and he did not abstract the plea statement or include it in the addendum. It would be pointless, however, to require appellant to file a substituted addendum or abstract to cure these deficiencies in conformance with Ark. Sup. Ct. R. 4-2(b), or supplement the record, as it is clear on the record before us that appellant could not prevail.

In his original claim for postconviction relief, appellant argued that his trial attorney rendered ineffective assistance of counsel by incorrectly claiming that he could be sentenced to forty years' imprisonment by a jury and by failing to apprise appellant that the sentence imposed was subject to Act 1326 of 1995, codified at Ark. Code Ann. §16-93-611 (Repl. 2006).² He also argued that his guilty plea was coerced as he was not informed of the application of Act 1326. Further, appellant complained that neither the prosecutor nor the judge apprised appellant of the application of Act 1326 to his sentence.

The trial court held a hearing on appellant's petitions. During the hearing, appellant additionally raised the issue of a speedy-trial violation.³ On appeal, appellant's main argument is that trial counsel and the prosecutor failed to inform him that Act 1326 applied to his sentence.⁴ We

²This act provides that anyone convicted of certain serious offenses, including the manufacture of methamphetamine, will not be eligible for parole until seventy percent of the sentence has been served.

³Although the trial court determined that appellant's oral request to amend his petition was untimely, the trial court nonetheless reviewed the record and determined that no speedy trial violation existed.

⁴Appellant did not argue on appeal that his guilty plea was coerced or that a speedy-trial

do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

The plea statement filed in this matter was signed by appellant. The document indicated that he talked over the plea agreement with his attorney and accepted the plea agreement as fair and reasonable. Testimony at the hearing on appellant's postconviction petitions indicated that the State originally offered a sentence of twenty years with ten years suspended, and that trial counsel was ultimately able to obtain a better sentence for appellant.

At the hearing, trial counsel, Mr. Snively, testified that he discussed the seventy-percent law with appellant, and recalled doing so as the law changed between the time the charges were filed and the time appellant was sentenced. Mr. Snively also recalled that he discussed twenty years' imprisonment being the maximum sentence for this charge. A letter written by Mr. Snively to appellant supported his testimony.

Appellant claimed that he did not receive this letter, but the trial court found the testimony of Mr. Snively more credible than appellant's testimony, and determined that Mr. Snively did discuss this the seventy-percent law with appellant. Such conflicts in the testimony were for the trial judge to resolve, and the judge was not required to believe any witness' testimony, especially that of the

violation occurred. Claims raised below but not argued on appeal are abandoned. *See Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004).

Further, it is well-settled that the we will not consider an argument raised for the first time on appeal. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998). On appeal, in Point II, appellant raises for the first time that Act 1034 of 2005, codified at section 16-93-611(a)(3), applies to his sentence, making him eligible for certain meritorious good time credits.

accused, since he is the person most interested in the outcome of the proceedings. *Harper v. State*, 359 Ark. 142, 194 S.W.3d 730 (2004).

Appellant testified at the hearing that this issue initially arose when he attempted to enter a boot camp program and was rejected, he claimed, as a result of Act 1326. However, no documents related to appellant's plea agreement, or any testimony given at the hearing, indicated that appellant's plea agreement was conditioned upon his entry into a boot camp program, and it did not appear that he discussed this option with trial counsel.

To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). Where a case involves an allegation of ineffectiveness in relation to a guilty plea, the appropriate standard of prejudice is whether, but for counsel's errors, there is a reasonable probability that the defendant would not have entered a guilty plea and thereby waived his right to a trial. *Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003).

Here, appellant failed to prove that trial counsel's representation fell below an objection standard of reasonableness. Further, appellant failed to show that he was prejudiced as a result of trial counsel's actions. He testified during the postconviction hearing that he expected to be incarcerated for six years, which is the sentence he received. Evidence adduced at the hearing supports trial counsel's contention that the seventy-percent law was fully discussed with appellant prior to the trial court's acceptance of the guilty plea. Giving respectful consideration to the findings of the trial court, and in reviewing the totality of the evidence, we hold that the trial court was not

erroneous in denying appellant's claim that trial counsel rendered ineffective assistance in this matter.

Moreover, it appears that appellant has failed to properly apply the language of the statute to this matter. Only section 16-93-611(3) contains a limitation by date: it applies to "offenses committed on or after August 12, 2005," and does not refer to the date of sentencing. The remainder of the statute applies to the sentences of criminal defendants for certain crimes regardless of when the offense was committed or the sentence was pronounced. Thus, appellant's contention that "Act 1326 states that if you were sentenced prior to August 12, 2005, you are not eligible for good time[]" is wholly incorrect. Thus, whether appellant was sentenced on December 12, 2005, has no bearing on the application of this statute to his sentence.

As to whether the prosecutor was required to inform appellant about the application of Act 1326, appellant cites no authority for this proposition. The trial court did not err in denying appellant's claim on this point.

Appeal dismissed; motions moot.